Tee Boon Hock v Dato' Tee Kim Poo & Ors

HIGH COURT (KUALA LUMPUR) — ELECTION PETITION NO PP6 OF 2004
RAUS SHARIF J
29 OCTOBER 2004

Election — Petition — Application for declaration that elections were null and void — Non compliance with written law in conduct of election — Illegal extension of polling hours — Whether election can be declared void if extension did not affect result of election

Election — Expenses — Election expenditure incurred by friends and supporters — Whether considered as candidate's election expenditure

Election — Petition — Failure to plead — Whether can nullify election on grounds not pleaded in petition

This election petition was filed by the petitioner, a candidate for the state constituency of N47, Pandamaran, Selangor, in the last general election held on 21 March 2004. In the said election, the first respondent was returned as being duly elected with a majority of 431 votes over the petitioner. In this election petition, the petitioner applied from the court to declare the said election void and that the first respondent was not duly elected or ought not to have been returned. Seven grounds were forwarded. However, at the trial, the petitioner had only relied on two grounds; (i) the third respondent, Suruhanjaya Pilihan Raya Malaysia, had illegally extended the polling hours in contravention of reg 11(5) and Form 8 of the Election (Conduct of Elections) Regulation 1981 ('the Election Regulations 1981'); and (ii) the first respondent had committed an offence under s 19(1)(b) of the Election Offences Act 1954 ('the Act'), when he or his agent or with his knowledge or consent, had spent more than RM100,000 in respect of the conduct of the election. This included expenditure incurred by outsiders. In addition the learned counsel for the petitioner in his submission has also urged the court to find the first respondent guilty of illegal practices which was not pleaded in the petition.

Held, dismissing the petition with costs:

(1) The mere fact that the voting hours was extended, contrary to reg 11(5) and Form 8 of The Election Regulation 1981, does not per se nullify the election. The petitioner must also prove that the extension of voting hours has affected the result of the election (see para 20).

(2) Even if the evidence of the petitioner's witnesses is accepted without any reservation, the maximum number of voters who voted during the extended polling hours were altogether 31. Surely the 31 votes could not in any way have affected the result of the election bearing in mind that the first respondent had won the election with a majority of 431 votes (see para 24).

(3) The expenditure of the cut-out does not fall under s 19 of the Act. In *Mubarak Madzoor v Lal Bchadr* (1958) 20 ELR 176, the Allahabad High Court in India decided that expenditure incurred by friends and supporters of the election candidate does not fall under s 123(6) of their Act (in pari materia with s 19 of our Act), even if the said candidate has knowledge about the fact during the election itself. In the present case, the first respondent did not have any idea of the cut-out put up by IPF. Therefore, the expenditure for the said cut-out cannot be taken as election expenses of the first respondent (see para 61).

(4) From the evidence the petitioner had failed to satisfy the court that the first respondent had exceeded his expenditure in excess of RM100,000. Accordingly, the petitioner's second ground must also fail (see para 71).

(5) Following *Wan Daud bin Wan Jusoh v Mohamed bin Haji Ali & Anor* [1988] 2 MLJ 384 in interpreting r 4 of the Election Petition Rules 1954 the court held that a petition under r 4 must not only narrate the facts complained of but must relate or associate the complaints with the provisions of the election laws the respondent was alleged to have transgressed. In the present case, the petitioner had failed to do both. Thus, the additional grounds raised by the petitioner's counsel in his submission need not be addressed by this court (see para 75).

[**Bahasa Malaysia summary**

Petisyen pilihan raya ini telah difailkan oleh pempetisyen, seorang calon bagi kawasan pilihan raya N47, Pandamaran, negeri Selangor pada pilihan raya umum yang diadakan pada 21 Mac 2004. Dalam pilihan raya tersebut, responden pertama merupakan calon yang di lapor pilih dengan undian majoriti sebanyak 431 undi lebih daripada pempetisyen. Dalam petisyen pilihan raya ini, pempetisyen memohon kepada mahkamah untuk membuat satu deklarasi bahawa pilihan raya tersebut adalah tidak sah dan responden pertama tidak dipilih dengan sewajarnya atau tidak sepatutnya kembali sebagai calon yang di lapor pilih. Tujuh alasan telah dikemukakan. Walau bagaimanapun pada masa pembicaraan, pempetisyen hanya bergantung kepada dua alasan, iaitu; (i) responden ketiga, Suruhanjaya Pilihan Raya Malaysia, telah secara tidak sah melanjutkan masa pengundian dan melanggar per 11(5) dan 23 Peraturan-Peraturan Pilihan Raya (Penjalanan Pilihan Raya) 1981 ('Peraturan-Peraturan Pilihan Raya 1981'); dan (ii) responden pertama telah melakukan kesalahan di bawah s 19(1)(b) Akta Kesalahan Pilihan Raya 1954 ('Akta itu'), apabila calon atau ejen pilihan raya yang dengan diketahuinya berbelanja lebih daripada RM100,000 dalam hal sesuatu pilihan raya. Ini juga termasuk perbelanjaan oleh orang luar. Tambahan pula peguam bagi pempetisyen dalam hujahnya mendesak mahkamah untuk memutuskan bahawa responden pertama telah melakukan perbuatan menyalahi undang-undang dan ini tidak diplid di dalam petisyen.

Diputuskan, menolak petisyen dengan kos:

(1) Hanya kerana masa pengundian telah dilanjutkan, melanggar per 11(5) dan Borang 8 Peraturan-peraturan Pilihan Raya 1981, tidak secara per se membatalkan pilihan raya tersebut. Pempetisyen mesti membuktikan bahawa perlanjutan masa pengundian itu telah menjejas keputusan pilihan raya tersebut (lihat perenggan 20).

(2) Dalam apa keadaan pun, sekalipun bukti saksi pempetisyen diterima tanpa sebarang kesangsian, jumlah undian maksimum yang diterima semasa lanjutan masa undian adalah sebanyak 31 undi. Sudah pasti kesemua 31 undi itu tidak dapat menjejas keputusan pilihan raya itu memandangkan responden pertama telah menang pilihan raya tersebut dengan undian majoriti sebanyak 431 undi (lihat perenggan 24).

(3) Perbelanjaan lebihan itu tidak jatuh di bawah s 19 Akta. Di *Mubarak Madzoor v Lal Bchadr* (1958) 20 ELR 176, Mahkamah Tinggi di Allahabad, India memutuskan bahawa perbelanjaan oleh kawan-kawan dan penyokong-penyokong calon pilihan raya tidak jatuh di bawah s 123(6) Akta (*pari materia* dengan s 19 Akta itu), walaupun ia diketahui oleh calon tersebut pada masa pilihan raya itu. Dalam kes ini, responden pertama tidak tahu mengenai perbelanjaan lebihan oleh IPF. Oleh itu perbelanjaan bagi lebihan itu tidak boleh diambil kira sebagai perbelanjaan pilihan raya responden pertama (lihat perenggan 61).

(4) Berdasarkan bukti-bukti yang sedia ada, pempetisyen gagal memuaskan mahkamah bahawa responden pertama telah melebihi RM100,000 dalam perbelanjaannya. Maka, alasan kedua yang dikemukakan oleh pempetisyen juga gagal (lihat perenggan 71).

(5) Mengikut *Wan Daud bin Wan Jusoh v Mohamed bin Haji Ali & Anor* [1988] 2 MLJ 384 dalam mentafsirkan r 4 Kaedah-kaedah Petisyen Pilihan Raya 1954 mahkamah memutuskan bahawa suatu petisyen di bawah per 4 bukan sahaja mengulas fakta yang diadu tetapi juga mesti mengaitkan aduan tersebut dengan peruntukkan-peruntukkan dalam undang-undang pilihan raya yang dinyatakan telah dilakukan oleh responden. Dalam kes ini, pempetisyen gagal dalam kedua-dua situasi. Oleh itu, alasan tambahan yang dikemukakan oleh peguam pempetisyen dalam hujahnya tidak perlu dibicarakan oleh mahkamah ini (lihat perenggan 75).]

Notes

For cases on application for declaration that elections were null and void, see 6 *Mallal's Digest* (4th Ed, 2004 Reissue) paras 1902–1906.

For cases on expenses, see 6 *Mallal's Digest* (4th Ed, 2004 Reissue) paras 1876–1877.

For cases on petition generally, see 6 *Mallal's Digest* (4th Ed, 2004 Reissue) paras 1889–1950.

Cases referred to

Abdul Hamed bin Mamat v Ustaz Baharudin bin Mohd & Ors [301] MD 6 (refd)
Ang Thye Chia lwn Chua Kow @ Chua Kaw Eng & 2 lagi [1996] 1 CLJ 49 (refd)
Harris Mohd Salleh v The Returning Officer Ismail bin Majis & 6 Ors [2001] 3 MLJ 433 (refd)
Isahak Hamid v Mustapha [1965] 2 MLJ 18 (folld)
Ismail Kamus v Pegawai Pengurus Pilihan Raya & 2 lagi (PP 4/2004) (refd)
Mohamed Jaafar v Sulaiman & Anor [1970] 1 MLJ 18 (folld)
Morgan & Others v Simpson and Anor [1974] 3 All ER 722 (refd)
Mubarak Madzoor v Lal Bchadr (1958) 20 ELR 176 (refd)
Muip bin Tabib v Dato James Wong [1971] 1 MLJ 246 (folld)
Election Petition of Cheah Seng Teik, Re [1958] MLJ 275 (folld)
Tanjong Puteri Johore State Election Petition; Abdul Razak bin Ahmad v Datuk Md Yunos bin Sulaiman & Anor, Re [1988] 2 MLJ 111 (refd)
Wan Daud bin Wan Jusoh v Mohamed bin Haji Ali & Anor [1988] 2 MLJ 384 (folld)

Legislation referred to

Election (Conduct of Elections) Regulation 1981 reg 11(5), Form 8
Election Offences Act 1954 ss 11, 15(A), (1), (2), (4), 19(1)(b), 20(1), (4), 23(4), 32(b)
Election Petition Rules 1954 r 4(1)
United Kingdom Representation of the People's Act 1949 [UK] s 37(1)

Chan Kok Keong (Ngeh Koo Ham, Yau Wai Leong and David Chai Kai Wooi with him) (Ngeh & Co) for the petitioner.
HK Teh (R Kaushalya with him) (Shafee & Co) for the first respondent.
Azizah Nawawi (Suzana Atan and Junaidah Abdul Rahman with her) (Attorney General's Chambers) for the second and third respondents.

Raus Sharif J:

[1] This election petition was filed by the petitioner, Tee Boon Hock, a candidate for the state constituency of N47, Pandamaran, Selangor, in the last general election held on 21 March 2004. In the said election, the first respondent, Dato' Tee Kim Poo, was returned as being duly elected with a majority of 431 votes over the petitioner.

[2] In this election petition, the petitioner is applying from the court to declare the said election void and that the first respondent was not duly elected or ought not to have been returned. Seven grounds were forwarded. However, at the trial, the petitioner had only relied on two grounds:

(1) The third respondent, Suruhanjaya Pilihan Raya Malaysia, had illegally extended the polling hours in contravention of regulation 11(5) and Forms 8 of the Election (Conduct of Elections) Regulation 1981. (Election Regulations 1981).

(2) The first respondent had committed an offence under s 19(1)(b) of the Election Offences Act 1954 (the Act), when he or his agent or with his knowledge or consent, had spent more than RM100,000 in respect of the conduct of the election.

I ILLEGAL EXTENSION OF POLLING HOURS

[3] The gazetted polling hours for N47 Pandamaran, were from 8am to 5pm on 21 March 2004. The gazetting of the polling hours is in fulfillment of reg 11(5) of the Election Regulations 1981 which provides:

> (5) … , the State Election Officer shall cause to be published in the Gazette and also in such manner as he think fit a notice as set out in Form 8 in First Schedule specifying:
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> (a) the constituency in which the election is contested;
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> (b) the date on which the poll will be taken;
>
> (c) the names of the candidates in the order in which they will be printed on the ballot papers, the symbol allotted to each candidate and the names of their proposers and seconders; and
>
> (d) the situation of the polling station or polling stations for each of the polling districts for that constituency and *the hours between which each polling station will be open*. (Emphasis added.)

[4] Accordingly, a notice as set-out in Form 8 was gazetted on 13 March 2004 (PU(B) 128) which amongst other things, set out the polling hours from 8am to 5pm. However, on the polling day, at about 5pm, the third respondent extended the polling hours for all polling stations in N47 for another two hours ie from 5pm to 7pm.

[5] It was the contention of the petitioner that such extension of polling hours by the third respondent was a clear non-compliance with the provisions of reg 11(5) and Form 8 which constitute a ground under s 32(b) of the Act for the election to be declared void.

[6] Section 32(b) of the Act provides as follows:

> 32 The election of a candidate at any election shall be declared to be void on an election petition on any of the following grounds only which may be proved to be satisfaction of the election judge:
>
> (b) non-compliance with the provisions of any written law relating to the conduct of any election if it appears that the election was not conducted in accordance with the principles laid down in such written law and that such non-compliance affected the result of the election;

[7] It was submitted by Mr Chai Kai Wooi, the learned counsel for the petitioner, that s 32(b) should be read in the disjunctive in the following manner:

(i) non-compliance with the provisions of any written law relating to any election if it appears that the election was not conducted in accordance with the principles laid down in such written law; or

(ii) non-compliance with the provisions of any written law relating to any election and that such non-compliance affected the result of the election.

[8] Thus, according to Mr Chai, since the election in N47 Pandamaran was not conducted in accordance with the law, the court must declare it to be void and a fresh election be conducted, without the necessity to inquire whether the non-compliance had affected the result of the election.

[9] Cik Kaushalya, for the first respondent submitted otherwise. According to her, that on proper interpretation, s 32(b) clearly establishes that non-compliance of any written law relating to any election is per se not fatal unless such non-compliance affects the result of the election.

[10] Senior Federal Counsel, Azizah Hj Nawawi, for the second and third respondent, holds a similar view. She submitted that s 32(b) must be read conjunctively and thus incumbent on the petitioner to prove not only that there has been a non-compliance with the provisions of any written law relating to the election but he must also prove that such non-compliance has affected the result of the election.

[11] Section 32(b) has been judicially considered in a number of cases. In *Re Election Petition of Cheah Seng Teik* [1958] MLJ 275 Rigby J in interpreting s 32(b) of the then Ordinance, held as follows:

> That sub-section provides that the election of the candidate may be declared void on an election petition for non-compliance with the provisions of any written law relating to any election, if it appears that the election was not conducted in accordance with the principles laid down in such written law and that such non-compliance affected the result of the election.

[12] Similarly, in *Isahak Hamid v Mustapha* [1965] 2 MLJ 18, Ismail Khan J (as he then was) held as follows:

> It is clear that the ground stated in the petition for the relief claimed bring it within the ambit of s 32(b) of the Ordinance. To succeed, however, the petitioner has to establish that not only there is a non-compliance with the provisions of the section, but that because of such non-compliance the election was not conducted according to the principles of such election law and further that such non compliance has affected the result of the election.

[13] In *Mohamed Jaafar v Sulaiman & Anor* [1970] 1 MLJ 18, Chang Min Tat J (as he then was) held that mere allegation alone of non-compliance of law relating to the election is insufficient to constitute a valid ground under s32(b). In that case, on the issue of whether the officer had a duty to order a recount, his Lordship held:

Further, even if the petitioner had properly exercised his right to a re-count under reg 25(8)(b) and had indicated his intention with sufficient clarity to the returning officer or even if the petitioner could be heard by me on the ground he did not advance either at the court or his petition, be still had to show that the result would have affected or different and this he singularly failed to do.

[14] Further, in *Muip bin Tabib v Dato James Wong* [1971] 1 MLJ 246**,** BTH Lee J (as he then was) held as follows:

The provisions of our s 32(b) are quite clear.

The onus is on the petitioner to prove to the satisfaction of the election judge the following:

(a) non-compliance with the provisions of any written law relating to the election; and

(b) that such non-compliance affected the result of the election.

[15] The above cases clearly indicates that in order to succeed under s 32(b), the petitioners must prove to the satisfaction of the election judge not only the non-compliance with the provision of any written law relating to election but also that such non-compliance affected the result of the election.

[16] However, in *Re Tanjong Puteri Johore State Election Petition; Abdul Razak bin Ahmad v Datuk Md Yunos bin Sulaiman & Anor* [1988] 2 MLJ 111, Wan Yahya J (as he then was) interpreted s 32(b) differently. His Lordship held that although the various discrepancies in the way the election was conducted did not affect the outcome of the election, the court should still declare the election void as it was not conducted in accordance with the law. In coming to said conclusion, Wan Yahya J appears to have followed and accepted the principle established by Lord Denning in *Morgan & Others v Simpson and Anor* [1974] 3 All ER 722. In the said case, Lord Denning in interpreting s 37(1) of United Kingdom Representation of the People's Act 1949 held as follows:

If the election was conducted so badly that it was not substantially in accordance with the law as to the election, the election is vitiated, irrespective of whether the result was affected, or not ….

[17] The decision of Wan Yahya J in *Tanjong Puteri* was followed by Ahmad Fairuz H (as he then was) in *Abdul Hamed bin Mamat v Ustaz Baharudin bin Mohd & Ors* [301] MD 6 and Mohamed Kamil Awang J in *Harris Mohd Salleh v Ismail bin Majin, Returning Officer & Ors* [2001] 3 MLJ 433.

[18] However, not all cases after *Tanjong Puteri* adopted the same approach in interpreting s 32(b). Abdul Hamid H (as he then was) in the case of *Ang Thye Chia lwn Chua Kow @ Chua Kaw Eng & 2 lagi* [1996] 1 CLJ 49 followed the decisions in cases prior to *Tanjong Puteri.* At p 60 of the case, Abdul Hamid Mohamad J held:

Jadi kesimpulannya, dalam penghakiman saya, di bawah s 32(b), pemilihan seseorang calon dalam sesuatu pilihan raya itu hendaklah diisytiharkan batal jika hakim pilihan raya berpuas hati bahawa kerana ketidakpatutan peruntukan-peruntukan mana-mana undang-undang bertulis berhubungan dengan pilihan raya, pilihan raya itu tidak dijalankan mengikut prinsip-prinsip yang ditetapkan di dalam undang-undang bertulis dan bahawa ketidakpatuhan itu telah menyentuh keputusan pilihan raya itu.

[19] Recently, I have occasioned to decide on the same issue in *Ismail Kamus v Pegawai Pengurus Pilihan Raya & 2 lagi* (PP 4/2004) where I concluded as follows:

> Pada saya peruntukan s 32(b) adalah begitu jelas dan nyata. Bukan sahaja pempetisyen perlu membuktikan dengan memuaskan hati Hakim Pilihan Raya tentang ketidakpatuhan peruntukan mana-mana undang-undang bertulis berkaitan dengan pilihan raya, tetapi perlu juga dibuktikan bahawa ketidakpatuhan itu menyentuh keputusan pilihan raya itu.

[20] I still hold the same view. To me, the mere fact that the voting hours was extended, contrary to reg 11(5) and Form 8, does not per se nullify the election. The petitioner must also prove that the extension of voting hours has affected the result of the election.

[21] From the evidence adduced by the petitioner, it is clear that reg 11(5) and Form 8 had been infringed. This has not been disputed by the respondents. Thus, what needs to be decided is whether the petitioner has adduced sufficient evidence to satisfy this court that the extension of the polling hours from 5pm to 7pm had materially affected the result of the election.

[22] The petitioner had called four of his polling and counting agents as witnesses Leow Keah Huat (PW3), Tew Leong Yew (PW4), Ong Chai Huat (PW7) and Yap Hock Siew (PW8) were on duty during the extended polling hours. PW3 who was at Saluran 4, Sekolah Tengku Ampuan Jemaah, testified that five voters came to vote. PW4 who was at Saluran 5, Sekolah Kebangsaan Kg Raja Uda, testified that about 10 to 20 voters came to vote. PW7 who was at Sekolah Kebangsaan (Cina) Pandamaran B stated that only one person came to vote while PW8 who was at Saluran 4 Sekolah Kebangsaan (Cina) Pandamaran A stated that five voters came to vote.

[23] The evidence of the petitioners' witnesses in respect to the number of people who voted during the extended polling hours was challenged by the respondents Chua Siok Wei (RW2) who was on duty at the same place and time as PW3, testified that only one person came to vote and not five as stated by PW3. Goh Keng Soon (RW1) who was on duty at the same place and time as PW4, testified that not a single voter came to vote and thus contrary to what was said by PW4 who said that about 10 to 20 voters came to vote. Wei Huei Hong (RW6), who was on duty at the same place and time as PW8 testified that there were only two voters who voted and not five as stated by PW8. The second and third respondent's only witness, Suraya bte Ghazali (RW12) who was the Ketua Tempat Mengundi at Saluran 5, Sekolah Kebangsaan

Kg Raja Uda, where PW4 and RW1 were stationed, testified that no voter came to vote during the extended polling hours.

[24] To me, even if the evidence of the petitioner's witnesses is accepted without any reservation, the maximum number of voters who voted during the extended polling hours were altogether 31. Surely the 31 votes could not in any way have affected the result of the election bearing in mind that the first respondent had won the election with a majority of 431 votes.

[25] The petitioner is on a weaker ground when the evidence of the respondents' witnesses is considered. Surely the evidence of PW4 who testified that 10 to 20 voters came to vote at Saluran 5 Sekolah Kg Raja Uda could not be true in light of the evidence of RW1 and RW12.

[26] Clearly, from the evidence adduced before me the petitioner had failed to satisfy me as how the majority votes of 431 obtained by the first respondent can be affected by the handful of voters who voted during the extended polling hours. It was submitted by Mr Chai, that it is the duty of the second and third respondents to show how many voters actually voted during the extended polling hours, since they were in possession of the facts and figures. But I am of the view, the burden of proof under s 32(b) is with the petitioner. In any event, the facts and figures were also within the knowledge of the petitioner. The petitioner's voting and counting agents were at all material time present at all stations during the extended polling hours. Except for PW3, PW4, PW7 and PW8, the petitioner did not call his other polling and counting agents. The net result is that the petitioner has not adduced sufficient evidence to prove to my satisfaction that the non-compliance of reg 11(5) and Form 8 has affected the result of the election. Accordingly, the petitioner's first ground must fail.

II ILLEGAL PRACTICE

[27] The petitioner is alleging that the first respondent had committed an offence in contravention of s 19(1)(b) of the Act because the first respondent or his agent or with his knowledge or consent, had spent more than RM100,000 in relation to the conduct of the election. Section 19(1)(b) provides as follows:

> 19(1)Subject to such exception as may be allowed in pursuant of this Act, no sum shall be incurred by a candidate at an election or by his election agent, after the date of publication of the notice of the election the *Gazette* during or after an election on account of or in respect of the conduct or management of such election in excess of:
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> (b) one hundred thousand ringgit in the case of an election to a State Legislature Assembly.

[28] Further, s 19(2) provides that any candidate or election agent who knowingly acts in contravention of the above provision shall be guilty of an illegal practice.

[29] There is no dispute that the first respondent has within 31 days after the date of the publication of the election result in the *Gazette,* deposited with the state election officer the 'return respecting election expenses' in Form B as required by the Act. The expenses in form B was filed by the first respondent election agent, Tan Boon San @ Tan Hock Guan (RW9). The expenditure listed were as follows:

BELANJA PILIHAN RAYA YANG DILAKUKAN		
Perihalan	Butir-butir Seperti dalam Senarai No	Amaun RM
Pembayaran kepada ejen, kerani dan pengurus	-	0
Belanja perjalanan yang tersebut di atas	-	0
Belanja perjalanan bagi orang lain	-	0
Pencetakan	1	55,000.00
Pengiklanan	2	9,691.66
Alat tulis	3	2,927.90
Bayaran pos, bayaran telegram dan telefon	-	0
Sewa bilik bagi perjumpaan awam atau sebagai bilik jawatankuasa	4	13,766.00
Lesen	-	0
Perbelanjaan pelbagai	5	120.00
Belanja oleh orang yang dibenarkan	-	0
Tuntutan yang dipertikaikan	-	0
Tuntutan yang belum dibayar	-	0
	Jumlah:	81,505.56

As can be seen from the above, the total expenditure declared by the first respondent was RM81,505.56.

[30] It is the contention of the petitioner that many more items are missing in the said return. According to the petitioner the first respondent has failed to disclose the payments for campaign workers' allowance, food and drinks supplied to workers, video compact disc (VCD), billboards, *pondok panas*, computers, jackets/vests, caps, badges, umbrellas, mineral water, booklet and telephones. The petitioner also complained that the first respondent has failed

to disclose payments made by outsiders in support of his campaign. The petitioner was referring to expenses of cut-outs by the Indian Progressive Front (IPF), lorry advertising by Chong Boon Heng (RW3), Tien Fa Tuah temple function, supporters who provided vehicles bearing BN logos used throughout the campaign period and during the election day.

[31] According to the petitioner, based on his estimate, apart from RM81,505.56 declared in Form B the first respondent must have spent at least another RM154,326.50 for his election campaign.

[32] Thus the question is, has the petitioner adduced sufficient evidence to substantiate his statement on the additional expenditure incurred by the first respondent. I will now deal with the items as raised by the petitioner.

(a) Campaign workers allowances and ancillary expenses

[33] It is the contention of the petitioner that the first respondent must have paid his polling and counting agents as well as his campaign workers who put up posters, banners, buntings, flags and distribution of campaign goods during the eight day campaign period. To support his contention, the petitioner produced Form B for N46 (P44), N48 (P45) and P110 (P46) constituencies which showed payments were made to the workers The candidate for P110 had disclosed spending RM4,840 for his counting and polling agents and clerks and RM7,200 for workers to put up posters and take them down. The candidate for N46 and N48 disclosed RM10,000 each for payment to their counting and polling agents.

[34] The first respondent in his evidence admitted to having employed around 400 workers during the campaign period and 200 polling and counting agents on the election day, but denied paying them any allowance. According to the first respondent, his polling and counting agents and the campaign workers were his party (MCA) members and they had worked for him voluntarily.

[35] Learned counsel for the petitioner, Mr Chan Kok Keong, in his submission, urged the court to take judicial notice that campaign workers were paid, besides being given food and drinks during the election. He also urged the court to use P44, P45 and P46 as a guidance as to the amount which the first respondent must have spent for his polling and counting agents as well as his campaign workers.

[36] With due respect, I do not think the submission is right. To me, the allegation of payments must be proved with evidence and not by mere allegations or inviting this court to take judicial notice that polling and counting agents or campaign workers were actually paid. To me, the petitioner has failed to produce any evidence to prove the allegation of payments by the first respondent to his polling and counting agents and campaign workers. On the contrary the testimonies of first respondent's witnesses RW1, RW2,

RW6 and RW8 supported the first respondent's evidence that no payments or allowances were paid to them. They also testified that the first respondent did not supply them with food and drinks while they were on duty as polling and counting agents.

[37] Thus, taking the evidence as a whole, I have no hesitation to find that the first respondent had not paid his polling and counting agents and his campaign workers. Nor did he spend any money for their food and drinks.

(b) Distribution of VCDs

[38] The petitioner in his evidence stated that the first respondent had extensively distributed VCDs (ID6) to households and coffee shops within the Pandamaran constituency. He stated that the ID6 was produced as part of first respondent's campaign for the election. According to him the first respondent had distributed at least 5,000 of ID6 costing about RM2 each. Thus, to the petitioner the first respondent would have spent RM10,000 on this item.

[39] To support his claim that VCDs were used by the first respondent in his campaign, the petitioner produced a picture (P40) showing the first respondent and his supporters holding VCDs.

[40] The first respondent in his evidence categorically denied any knowledge of ID6 and further categorically denied having distributed ID6 in thousands of pieces during the campaign as alleged by the petitioner. The first respondent after having seen ID6 during court recess confirmed that it was never distributed during the election. According to him the VCD that he was holding as seen in P40 was a Chap Goh Mei VCD, which he had just received to begiven to the MCA members. He further said that P40 was taken before he even knew he would be nominated as a candidate. According to him, it was taken at the request of reporters to mark the success of Chap Goh Mei celebration he helped to organise. The first respondent also said that the Chap Goh Mei VCDs were never distributed during the election campaign.

[41] Taking the evidence as a whole, I am more incline to believe the first respondent. Firstly, ID6 was never admitted as an exhibit. Thus the content is not known whether it was a campaign material of the first respondent. Secondly, no evidence was adduced by the petitioner to show when P40 was taken. The first respondent and RW8, in their evidence stated that P40, was taken well before the nomination day and it was taken at the request of reporters after the success of the Chap Goh Mei celebration organized by the first defendant. The reporters, who took P40, could have shed some light on this matter. However, they were not called by the petitioner. Further, the petitioner alleged ID6 were distributed to houses and coffee shops in Pandamaran. But no witnesses who received the ID6 was called by the petitioner. Thus, the allegation by the petitioner that the first respondent had

distributed ID6 during the election campaign and had incurred cost amounting to RM10,000 remains a mere allegation.

(c) Expenses for balloons, billboards, pondok panas, telephones and computers

[42] The petitioner in his evidence stated that the first respondent must have expended money on balloons, billboards, *pondok panas*, and computers and telephones during the election.

(i) Balloons

[43] The petitioner estimated the first respondent's expenditure on the balloons to be RM7,000. According to him five big balloons with Barisan Nasional (BN) logo were hoisted at five locations, namely at MCA Service Centre in Pandamaran, MCA Service Centre in Port Klang, Pandamaran Flats, Pandamaran Sports Complex and Kg Raja Uda. The petitioner called Soo Vee Yaw (PW5) of Angkasa Balloons (M) Sdn Bhd who testified the costs of each balloon would be RM1,400. The quotation for such balloons was produced by PW5 is in P14.

[44] But the fact is PW5's company did not supply the balloons to the first respondent. Thus, the allegation that the first respondent had spent RM7,000 on the balloon is not substantiated and thus remain unproven.

(ii) Billboards

[45] The petitioner in his evidence stated that the first respondent put up six billboards with photographs printed on them. He estimated the cost about RM3,400. Thus, for six billboards the first respondent must have spent RM20,400. He based his estimate on the quotation from Temptation Marketing Sdn Bhd produced by En Chin Pen Kong (PW9).

[46] But it must be pointed out that PW9 did not construct the billboards. Thus, he has no personal knowledge whatsoever relating to the billboards and was merely giving his estimate as to the price of such billboards based on quotation prepared by his company. According to him, he did not know who the first defendant was at the time of the election.

[47] RW9 testified that there were no billboards as described by PW9 being constructed by the first respondent. According to RW9, the so called billboards were big posters pasted on pieces of plywood. The costs of the big posters were included in RM35,000 he paid to Selangor BN. The first respondent testified similarly. According to him the structures holding the big posters were erected from recycled pieces of wood with work provided by volunteer workers. Hence, according to him, there was no setting up costs involved except for the scaffolding expenses of RM600 for the billboard at junction of Jalan Yong and Jalan Chan Ah Choon which was declared in Form B.

[48] Thus, there is no basis for this court to find that RM20,400 was incurred by the first respondent in putting up the billboards.

(iii) Pondok Panas

[49] The petitioner stated that '*pondok panas*' or shelter were built outside polling stations and used by the first respondent workers on the polling day. According to the petitioner, there were 14 *pondok panas* and the cost for putting each *pondok panas* was RM180. Therefore, 14 x RM180 = RM2,520 must have been spent by the first respondent on the *pondok panas*.

[50] With respect, the petitioner's statement is a mere allegation and not supported by evidence. No doubt there were *pondok panas* utilised by the respondent's workers but there is no evidence that the first respondent had expended money on the *pondok panas*. It is the duty of the petitioner to provide such proof and he has failed to do so.

(iv) Computers

[51] The petitioner alleged that computers were used by the first respondent workers during the elections. According to the petitioner, the first respondent must have spent at least RM5,400 for rental of such computers. His estimate was based on quotation from Metro IT Computer Centre Sdn Bhd which quoted the rental of one unit of computer and printer as RM50 per day. The petitioner called En Lee Chee Lai (PW2) to produce the quotation. But his evidence is of little assistance because PW2 did not supply any computer to the first respondent. Thus, the fact that the first respondent did hire computers remains unproven. The first respondent in his evidence confirmed that he did not hire computers for the purpose of the election. Further, his witnesses, RW6 and RW7 testified that the computers that were used by the workers were their personally owned notebooks and they were not rented from any parties.

(d) Expenditure for jackets/vests, caps, and badges

[52] The petitioner testified that jackets/vests were worn by the first respondent's workers, agents and supporters. He estimated there were 300 workers, agents and supporters of the first respondent wearing the jackets/vests on the nomination and polling day. According to the petitioner each jacket/vest, based on his personal experience in making similar jackets/vests would be RM45. Thus, the petitioner estimated that the first respondent must have spend RM13,500 on the said items.

[53] The petitioner also testified that caps and badges were also worn by the first respondent's workers, agents and supporters. According to him each cap would cost at least RM3.50. Thus, he concluded that the first respondent must have spent RM1,050 on the caps. In respect to the badges, he estimated the costs to be 50sen each. But according to him, 1000 of the respondent's

workers, agents and supporters had the badges and thus it must have cost the first respondent RM500 on that item.

[54] The first respondent denied spending money on the jackets/vests, caps and badges as alleged by the petitioner. According to him the badges and caps worn by his workers and supporters were supplied by the BN Selangor, which he received with other items such as posters, banners, one giant balloon, bottles of water bearing BN label, ballpoint pens, flags small note books and flyers, which cost him RM35,000 and accordingly declared in his Form B.

[55] To me, the petitioner's claim that the first respondent had expended money for the said item remains on allegation. Thus I find it difficult to accept the petitioner's statement that the first respondent had spent RM13,500 for jackets/vests, RM1,050 for caps and RM500 for badges.

(e) Expenses for hire vehicles and vans to ferry voters back and forth

[56] The petitioner alleged that the first respondent had hired at least 50 cars and vans at the rate of RM200 per vehicle to ferry voters to and from the polling stations. Thus, the total expenditure alleged for the said vehicles was RM10,000. However, the petitioner did not to adduce any evidence to prove his allegation. On the other hand, the first respondent's witness, RW9 testified that there were no payments made for vehicles bearing the BN logo used to ferry voters. The first respondent himself in his evidence denied the existence of 50 cars and vans hired for the purpose of ferrying voters during the polling day.

[57] Another point is this. The petitioner during cross-examination admitted that he knew under the Act that hiring transportation to ferry voters to and from polling centres is an illegal practice. However, the petitioner did not lodge any report against the first respondent of such illegal practice. Even in his election petition, the petitioner has not relied and pleaded this as a ground. Clearly, the allegation by the petitioner on the above expenses is an afterthought.

(f) Expenditure by outsiders

[58] The complaint by the petitioner is that the respondent has not disclosed the expenses incurred by outsiders who had spent money for the purpose of promoting the first respondent in the election. The petitioner was referring to expenses of cut-outs by IPF, lorry advertising by RW3 and the Tien Fa Tuah temple function.

(i) Cut-out by IPF

[59] The petitioner in his evidence stated that there was a cut-out effigy of the first respondent, constructed at the traffic light near the Pandamaran Police station. The petitioner estimated the cost of the cut-out at RM3,000 at least.

[60] The first respondent denied expending any money on the said cut-out. According to him he had not been informed about the cut-out before it was put up. He said he was invited to the site where the cut-out was put up and a photograph was taken. PW4, who was IPF Division Chief of Bandar Klang testified that he was responsible for putting up the said cut-out. He told the court that the said cut-out was put up by his party as a show of support to BN and to promote the involvement of IPF in the N47 Pandamaran election. Hefurther told the court that the cut-out was done voluntarily by members of IPF and expenses incurred was borne by the IPF.

[61] On the above facts, I am of the view that the expenditure of the said cut-out does not fall under s 19 of the Act. In *Mubarak Madzoor v Lal Bchadr* (1958) 20 ELR 176, the Allahabad High Court in India decided that expenditure incurred by friends and supporters of the election candidate does not fall under s 123(6) of their Act (in pari materia with s 19 of our Act), even if the said candidate has knowledge about the fact during the election itself. In the present case, the first respondent did not have any idea of the cut-out put up by IPF. Therefore, the expenditure for the said cut-out cannot be taken as election expenses of the first respondent.

(ii) Lorry advertising by RW3

[62] The petitioner firstly contended that the first respondent has used four mobile advertising vans mounted with billboards of the first respondent's portrait, which went around the Pandamaran constituency, daily during the campaign period promoting the first respondent. The petitioner's witness, PW6 stated that the van played music and made announcements on the profile of the first respondent while doing the round in the area of Pandamaran. The petitioner estimated the costs of rental for each mobile advertising van to be RM498 per day, ie RM1,992 per day for 4 mobile vans, making the total rent for the 4 vans for 8 days as RM15,936. He further estimated the costs for the billboards mounted on the four mobile vans as follows:

(a) The price to produce the vinyl sticker Billboard	RM 3,000
(b) The price to produce for the subsequent 3 billboards RM340 x 3	RM 1,020
	RM 4,020

[63] He further estimated the costs for audio recording at RM300 per language. According to him the first respondent used two languages ie Mandarin and Bahasa Malaysia. Therefore, according to him the first respondent must have spent RM600 for the audio recording. The petitioner based his estimate on quotations he obtained from Finn Mobile Advertising Sdn Bhd. However,

no evidence was produced to show that the first respondent has rented the said vans.

[64] The first respondent denied having rented the van as alleged by the petitioner. What transpired in this case is that RW3 on his own initiative supplied three lorries to Klang Parliamentary constituency in support of the BN candidate Dato' Paduka Dr Tan Yee Kew. According to RW3, the three lorries belonged to him and the drivers were his workers He further said the portrait of the first respondent was displayed only on one lorry and on one side of the lorry. According to him there were no cassette containing speeches of the first respondent at all.

[65] Thus, to me there is no necessity for the first respondent to declare the expenses incurred by RW3. Firstly, he did not hire any such vans as alleged by the petitioner. Secondly, no expenses were incurred by RW3, as he was using his own lorries and workers. Thirdly, it was done by RW3's own initiative without prior knowledge of the first respondent.

(iii) Dinner organised by Tian Fa Tuah Temple

[66] It was contended by the petitioner that the first respondent must have expended money for the two night function held on 18 and 19 March at SJK(Cina) Pandamaran by Tian Fa Tuah temple. But the petitioner did not set out in clear terms the items of expenditure which is allegedly attributed to the first respondent.

[67] RW8, who was the secretary of the Tian Fa Tuah Temple in his cross-examination stated that on 18 and 19 March, the temple organized a show time which was intended to collect donations for the temple and not to support or promote any BN candidate. RW8 stated that the first respondent made no contribution to the event and that the event was open to everyone and no invitation was given to any particular party.

[68] The first respondent explained that his attendance at the function was coincidental and not on invitation. He said that on 19 March 2004, when he was campaigning within the vicinity of SJK Cina Pandamaran B with his supporters and they decided to join the event. The first respondent denied having spent any money or involvement in organizing the event.

[69] The petitioner in his effort to connect the involvement of the first respondent in the said function referred to a photograph (P47) in which a cheque was held by the first respondent. However, RW8 stated that the photograph showed the cheque handling ceremony by former assemblyman Dato' Teh Chiang Ying for the Hong San Si Temple. The first respondent, who is also the adviser of the Hong San Si Temple stated that the ceremony depicted in P47 was a ceremony to hand over the allocation of the Selangor State Government by the former State Assembly man of Pelabuhan Klang,

Dato' Teh Chiang Yin to the President of the said temple. According to the first respondent, the photograph was taken at least two weeks before nomination day.

[70] Thus, I am of the view that the petitioner has failed to prove the first respondent had a role to play in organising the Tien Fa Tuah temple's function or expended money for the said function.

[71] As stated earlier, the petitioner had relied upon s 19(1) of the Act to avoid the election in that the first respondent has incurred expenditure beyond the prescribed limit as allowed by law. From the evidence as discussed above, it is my finding that the petitioner has failed to satisfy me that the first respondent had exceeded his expenditure in excess of RM100,000. Accordingly, the petitioner's second ground must also fail.

[72] In addition to urging the court to find the first respondent guilty of the following illegal practice for exceeding the ceiling on expenditure contrary to s 19 of the Act, Mr Chan in his submission has also urged this court to find the first respondent guilty of the following illegal practices:

(i) Failed to disclose the following items in his return:

  (a) VCDs;

  (b) Expenditure on allowances; and

  (c) Refreshment for workers;

  which is contrary to s 23 and therefore an offence under s 23(4) of the Act.

(ii) Failing to make payments and receipts through election agents as required under s 15(1) of the Act.

(iii) Permitting the following, namely:

  (a) Veerayah a/l Kanniah (RW4);

  (b) RW3; and

  (c) Those responsible for billboards

  to incur expenditure with a view to promoting and procuring the election of the first respondent without an authorization in writing contrary to s15A of the Act and therefore committing an illegal practice under s15(A)(4) of the Act.

(iv) Making a false declaration by saying that no personal monies were used contrary to s 11(f) of the Act when payments were in fact made by the first respondent.

[73] Further, Mr Chan also urged this court to find the following persons guilty of illegal practice and should be reported under s 37 of the Act:

(i) RW4 in breach of s 15(A)(4) for expending monies to promote the election of the first respondent by erecting a cut-out figure of the first respondent without any authorization in writing;

(ii) RW3, in breach of s 15(A)(4) for expending monies to promote the election of the first respondent by providing a lorry mounted with a billboard poster of the first respondent, without any authorization in writing;

(iii) RW9, the election agent of the first respondent, for filling a return and declaration despite not having any knowledge and/or belief of its truth and correctness and therefore has committed an illegal practice under s23(4) and s 11 of the Act;

(iv) Hua Lai Hock (RW11) who paid out and received monies in respect of the first respondent, expenses in breach of s 15(1) of the Act and therefore guilty of an illegal practice under s 15(2) of the Act;

(v) Teh Leng Kang, who advanced monies on behalf of the first respondent, expenses in breach of s 15(1) of the Act and therefore guilty of an illegal practice under s 15(2) of the Act;

(vi) MCA Pandamaran which advanced monies on behalf of the first respondent, expenses in breach of s 15(1) of the Act and therefore guilty of an illegal practice under s 15(2) of the Act.

[74] However, the above-mentioned illegal practices were not pleaded in the election petition. Rule 4(1) of the Election Petition Rules 1954 provides:

> 4(1) An election petition shall contain the following statements:
>
> (a) It shall state the right of the petitioner under s 34 of the Act; and
>
> (b) It shall state the holding and result of the election and shall briefly state the facts and grounds relied on to sustained the prayer.

[75] Wan Yahya J (as he then was) in *Wan Daud bin Wan Jusoh v Mohamed bin Haji Ali & Anor* [1988] 2 MLJ 384 in interpreting r 4 held that a petition under r 4 must not only narrate the facts complained of but must relate or associate the complaints with the provisions of the election laws the respondent is alleged to have transgressed. I am of the same view. In the present case, the petitioner has failed to do both. Thus, the additional grounds raised by Mr Chan in his submission need not be addressed by this court.

[76] I, therefore determine that the first respondent was duly elected and I shall so report to the Suruhanjaya Pilihan Raya Malaysia.

[77] The petition is dismissed with costs. Money deposited by way of security may be applied towards payment of taxed costs.

Petition dismissed with costs.

Reported by AG Kalidas